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91-493

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

LEE H. RICE and GOLDIE E. RICE, PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May the rights of a miner under the Mining Act of May 10, 1872 (30 U.S.C. § 26) be altered, diminished, abrogated, or denied by application of ex post facto law, discriminatory and arbitrary rules that exceed authority granted under federal statutes, or for an illegal purpose, not in accordance with the law?

2. If a mining claim has been declared "valid" following examination by a U.S. Forest Service mineral examiner, may it thereafter be "re-examined" and invalidated for any purpose, or taken without payment of "just compensation?"

3. Did the fact that Rices had the same judges on appeal who had previously ruled against them, and that U.S. District Court Judge, Roger G. Strand, had

twice refused to recuse himself from our case, violate Rices' Fifth and Fourteenth rights to fairness, due process, just compensation, and equal treatment under the law?

4. Was there fundamental error in the failure of the courts to consider the fact that the case had proceeded from an illegal basis, i.e., a secret and illegal land exchange proposal, and that our 10 Pick & Shovel claims were contested and examined for that purpose?

5. In determining if a mining claimant is in compliance with the "prudent man" and "marketability" tests, may the miner be required to show that he has spent more than is required under the statute for patenting (30 U.S.C. § 29), i.e., $500.00 per claim?

6. Did the Forest Service, Bureau of

Land Management and U.S. Attorney's office (AZ), exceed their authority and violate Rices Fifth and Fourteenth Amendment rights by contesting and examining claims that were no longer subject to the Law of Eminent Domain for "private" land exchanges?

7. In view of the limitations on federal "ownership" of public lands set forth in ARTICLE 1, Section 8, Clause 17, and the Tenth Amendment, may the federal government, its permittees, lessees, or assignees, use public domain or national forest lands as "basic collateral" for obtaining large loans?

8. Did the fact that Rices are appearing pro per, without formal legal training, give the plaintiff the right to brutally harass them, or to take unfair advantage of their lack of legal expertise?

9. Does the fact that the Forest Service has ignored the fact that the 3C Ranch owners had a large mill building and 7-room house on their unpatented Sitting Bull and Greenhouse mining claims, which have been occupied and used for non-mining purposes, but have mercilessly harassed Rices, who are bona fide mining claimants, show that there was/is collusion between the Forest Service personnel and the prominent owners of the 3C Ranch, aka VY-73C Ranch Corporation, Niles Thim Corporation, and Oracle Ranch?

10. Can the motivation of a government agency, bringing an action against a mining claimant, be arbitrarily deleted and ignored as a material issue of fact by the courts, when that act or motivation results in: false charges of trespass; an illegal mineral examination; conspiracy;

fraud; brutal and extended harassment; discrimination; the illegal taking of property without a trial or hearing; and disregard of a claimant's constitutional rights, while that same agency gives special and preferential treatment to an adjacent mining claimant, who is the land trade proponent?

11. May a mining claimant whose claim has previously been declared **"valid,"** with all asserted rights under the Mining Law of 1872, including the "exclusive" use of the surface of his claims, and who is in compliance with all state and federal mining laws and regulations, including payment of property taxes, be subjected to payment of retroactive rents and interest while he is still in litigation, especially, when the formula for such charges is based on

two different sets of assessed valuations for the same, identical land, the one for the mining claimant and homesite permittee on national forest lands being **nine** times higher than the price charged for the same lands when traded to the land trade proponent?

12. Did Assistant U.S. Attorney, Michael A. Johns, violate Rices' Fifth and Fourteenth Amendment rights to fairness and impartiality by deleting, misstating, and distorting essential material facts in his Complaint and subsequent pleadings, in violation of 18 U.S.C.S. § 1001?

LIST OF INTERESTED PERSONS

The only persons and entities having an interest in the outcome of this case are the Petitioners and the United States of America.

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IN THE
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October Term 1991

LEE H. RICE and GOLDIE E. RICE

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERITORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

Petitioners, Lee H. Rice and Goldie E. Rice, petition for a writ of certiorari to review the judgments of U.S. District Court Judge Roger G. Strand, dated July 3, 1986, April 14,

1988, and July 9, 1990, and the MEMORANDUM decision of Circuit Judges Norris, Beezer, and Brunetti, filed April 15, 1991, in 9th CCA No. 90-16329.

OPINIONS BELOW

The Ninth Circuit Court of Appeals affirmed the final judgment of U.S. District Court Judge Roger G. Strand, in a non-published decision entered on April 18, 1991. Their MEMORANDUM is reproduced in the Appendix. The same court denied rehearing on May 22, 1991. That decision is also contained in the Appendix, at App. p. 24.

JURISDICTION

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). Their petition is filed within the authorized period following the Ninth

Circuit Court's Order denying rehearing, on May 22, 1991, Sup.Ct. R. 13.4.

By an Order dated August 6, 1991, Sandra D. O'Connor, Associate Justice of the Supreme Court of the United States, extended the time for filing a petition for a writ of certiorari in this case to, and including September 21, 1991.

CONSTITUTIONAL PROVISIONS INVOLVED

Article 1, Section 8, Clause 17:

> Congress shall have the power ... to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may by cession of the particular states, and the acceptance of Congress, become the seat of government of the United States; and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; . . .

Article 1, Section 9, Clause 3:

No bill of attainer or ex post facto law shall be passed.

Fifth Amendment:

No person shall... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Tenth Amendment:

The powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Fourteenth Amendment:

... nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTES INVOLVED

5 U.S.C. § 706, App. p. 26

16 U.S.C. § 485, App. p. 27

18 U.S.C.S., CRIMES, § 1001. **Statements or entries generally:**

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. (June 25, 1948, ch 645, § 1, 62 Stat. 749.)

18 U.S.C.S. § 1863. **Trespass on national forest lands**

> Whoever, without lawful authority or permission, goes upon national forest land while it is closed to the public pursuant to the lawful regulation of the Secretary of Agriculture, shall be fined not more than $500 or imprisoned not more than six months, or both. (Added May 24, 1949, ch 139, § 43, 63 Stat. 95.)

28 U.S.C. 47. **Disqualification of trial judge to hear appeal**

> No judge shall hear or determine an appeal from the decision of a case or issue tried by him.

28 U.S.C. 144. **Bias or prejudice of judge**

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceedings... (As amended May 24, 1949, c. 139, § 65, 63 Stat. 99.)

28 U.S.C. § 455, App. p. 28

28 U.S.C. § 2072. **Rules of civil procedure**

> Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution...

30 U.S.C. § 22. **Lands open to purchase by citizens**

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the land in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs of the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

30 U.S.C.A. § 22, p. 50

> A valid claim, though unpatented, is a grant in the nature of an estate in fee, and if such an estate is taken by the United States just compensation must be made therefor under U.S.C.A. Const. Amend. 5. North American Transportation & Trading Co. v. U.S., 1918, 53 Ct.Cl. 424, affirmed 40 S.Ct. 518, 253 U.S. 330, 64 L.Ed. 935.

30 U.S.C. § 26, App. p. 29

30 U.S.C.S. § 26, n 10, p. 68:

> Person in possession of mining claim in mining district is presumed to be owner until contrary is shown, and possession of a mining claim under color of title in mining district for more than 20 years segregates land from public domain and prevents it from being opened to or for location.

30 U.S.C. § 29, App. p. 30

30 U.S.C. § 38. **Evidence of possession and work to establish right to patent**

> Where such person or association, they or their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to patent thereto under sections 21, 22 to 24, 26 to 28, 23, 30, 33 to 48, 50 to 52, 71 to 76 of

> this title and section 661 of title 43, in the absence of any adverse claim; but nothing in such sections shall be deemed to impair any lien which shall have attached in any way whatever to the mining claim or property thereto attached prior to the issuance of a patent.

30 U.S.C. § 612(a). **Prospecting, mining, or processing operations**

> Any mining claim **hereafter** located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining, or processing operations and uses reasonably incident thereto. (Emphasis added)

30 U.S.C. § 612(b), App. p. 33

STATEMENT OF THE CASE

This Petition is brought pursuant to Rule 10.1(a), Supreme Court Rules. Rices are appealing from an Order of Circuit Judges Norris, Beezer, and Brunetti, filed May 22, 1991, and denying our petition for

rehearing in 9th CCA Case No. 90-16329 (App. p. 24), which was brought pursuant to Fed. R. Civ. P. 60(b)(1)(2)(3)(4)(5) and (6). Circuit Judges Norris, Beezer, and Brunetti had previously reviewed this case under 9th CCA No. 88-2550, and had denied our petition for rehearing on November 15, 1989 (App. p. 35). The Ninth Circuit Court of Appeals had jurisdiction in both cases under 28 U.S.C. § 1291.

We were not advised by the Clerk that the same three Judges who had previously ruled against us had been assigned our case. Circuit Judges Norris, Beezer and Brunetti lacked jurisdiction in our case No. 90-16329, and were in violation of 28 U.S.C. §§§§ 47, 144, 453, and 455 (P.L. 93-512, 88 Stat. 1609, December 5, 1974) (See p. 6 and App. p. 28). They exceeded their authority in ruling against us a

second time and denied us our Fifth Amendment right to fundamental fairness. Their action was arbitrary, capricious, contrary to due process, and not in accordance with the law.

As may be verified by contacting the docketing clerk, we still have a NOTICE OF COMPLAINT FOR NON-NOTIFICATION OF ASSIGNMENT OF JUDGES TO CASE AND IMPROPER ASSIGNMENT, addressed to Chief Judge (J. Clifford Wallace), filed May 30, 1991, and a MOTION TO SET ASIDE DECISION AND REVERSE ORDER (filed June 19, 1991) pending before the Ninth Circuit Court of Appeals. In view of this fact, Circuit Judge Brunetti's Order, filed on July 16, 1991, denying our EMERGENCY MOTION FOR RECONSIDERATION . . . of his June 14, 1991, Order, which denied our EMERGENCY MOTION FOR STAY OF MANDATE AND FOR

INJUNCTION AND RESTRAINING ORDER PENDING FILING OF PETITION FOR WRIT OF CERTIORARI AND FINAL DECISION OF COURTS (See App. p. 36) was both premature and untimely. This is especially true in view of the fact that we had posted a supersedeas bond in the full amount of the Judgment ($7,091.15), on October 29, 1990 (See App. pps. 13-14).

* * * * * * *

This decades-old legal controversy initially resulted from illegal activities on the part of the U.S. Forest service personnel (Coronado National Forest) and the Bureau of Land Management (AZ), which keeps a record of all mining claims filed in the State, and is empowered to grant patents. It involves ownership of our 10 unpatented lode mining claims, known as the "Pick and Shovel Group," consisting

of approximately 20 acres each, and the assessment of retroactive rents, interest, and restoration costs on the Silver Earth claim, where we have lived since August, 1954, in the amount of $7,091.15.

We are appealing to this Court because Michael A. Hohns, Assistant U.S. Attorney (AZ), wrongfully charged us with the CRIME of trespass in his Complaint, filed December 13, 1984, and we have been unlawfully deprived of our Pick & Shovel Group of claims and improvements, including our house, two wells, extensive mine workings, roads, sheds, etc., located near Oracle, Arizona without a hearing or trial.

We are the victims also of ongoing, secret and illegal land exchange proposals between the Coronado National Forest personnel and our large neighbors, namely, the prominent owners of the adjacent 3C

Ranch, aka VY-73C Ranch Corporation, Niles Thim Corporation, and Oracle Ranch, all of whom were/are engaged in the real estate business and land development.

The 10 claims comprising our Pick & Shovel Group are located in Sections 9 and 16, T. 10S., R. 16 E., Gila and Salt River Base and Meridian, Pinal County, Arizona, and were located and recorded, as follows:

Name of Claim	Date Located	Date Recorded
Golden Earth	6/1/53	6/3/53
Silver Earth	6/1/53	6/3/53
Good Earth	1/7/54	1/27/54
New Year No. 1	8/11/54	8/14/54
New Year No. 2	8/11/54	8/14/54
Goldie's Fraction	6/21/56	8/27/56
Calcium Carbonate	9/12/61	9/21/61
Diabase Ridge	2/7/63	2/15/63
Three Sons	9/18/63	9/23/63
Lee's Fraction	9/18/63	9/23/63

These claims join a cluster of mines and are located in the highly mineralized Old Hat Mining District, in the Coronado

National Forest. We are surrounded by large mining operations, including the giant Magma Copper Company, which built the nearby town of San Manuel to house its employees, and Newmont Exploration Ltd., perhaps the largest gold mining company in the world, who have recently restaked unpatented claims in this area that were unlawfully seized from their rightful owners by the U.S. Forest Service in the 1960's. Newmont has also leased the patented Campo Bonito and Tucson YMCA claims, which are located within one-half mile of our Silver Earth, Golden Earth, and Good Earth claims.

Our Pick & Shovel Group of claims were legally entered and located under the provisions of 30 U.S.C. §§ 22 and 26 (See p. 7 and App. p. 29). The area has never been closed to mineral entry.

The Mining Act of May 10, 1872 (30 U.S.C. § 26, App. p. 29), provides as follows:

> ... the locators of **all** mining locations... **their heirs and assigns**... shall have **exclusive right of possession and enjoyment of all the surface included within the lines of their locations.** (Emphasis added)

Numerous mining laws attest the fact that the locator of a mining claim had the sole legal right to sell, lease, assign, mortgage, or bequeath his claim from the date of location or filing.

Our Pick & Shovel and Wood Stove Groups of unpatented mining claims are located upon the American Flag Grazing Allotment (U.S. Forest Service Permit No. 05-5932). As shown by a copy of a lengthy DEED, placed into evidence by us at the trial for damages, held on November 9, 1987, at Phoenix, this renewable, 10-year

federal grazing permit gave Theodore J. and Elizabeth B. Vaitses, who acquired the 3C Ranch from Mary West, on June 12, 1959, "... a right to graze 240 head of cattle on approximately 11,520 acres of United States Land in the Coronado National Forest..."

This DEED, copies of which were filed with our pleadings many times, also showed that the Vaitses had acquired Mary West's mining interests, known as the Border Land and Mining Company, "which included four patented claims, and "(c) All unsold unpatented claims - approximately 200 in number; and (d) Assignments of nine contracts of sale escrowed with Southern Arizona Bank and Trust Company, covering nine unpatented claims which Mrs. West had sold to others..." This DEED contained a list of 318

unpatented mining claims, all but 40 of which are located in Pinal County. All of these claims except the Sitting Bull and Greenhouse Nos. 1 and 2 claims are designated "West" or "Mary West," followed by a number.

As we documented many times, there is a large mill building with attached 7-room house upon the unpatented Sitting Bull claim, and an 18-space trailer park, wash-house and shed, built for mill employees, in the 1950's, on an adjacent Greenhouse claim. Although these buildings have been used and occupied for non-mining purposes many years, the owners of the 3C Ranch have never been harassed for retroactive rents and interest on the Sitting Bull claim, nor have the Coronado National Forest personnel demanded that they tear the buildings down and pay restoration costs. The Sitting Bull and Greenhouse

claims had the same legal status as our Silver Earth and other Pick & Shovel claims. Ms. Rowe performed annual assessment work upon them, along with her other 172 unpatented claims in Pinal County, until she sold them to Niles and Minnie Thim, in 1981. **None** of the 3C Ranch's claims were ever contested or examined for validity by the U.S. Forest Service.

The 3C Ranch owners also enjoyed a privileged status with regard to the American Flag Grazing Allotment. According to two newspaper articles in the SAN MANUEL MINER (1/7/87), copies of which were submitted by us as exhibits and excerpts of record, Forest Service Permit No. 05-5932 and State Lease 200, for 19,200 acres of State-leased lands, were used by Thelma M. Rowe, of the VY-73C Ranch Corporation, as "basic collateral"

for obtaining a $1,300,000 loan from Arizona Formers Credit Association (PCA), now known as Arizona Agricultural Credit Association of Phoenix, who foreclosed on the mortgage, in January, 1987. Although she had disposed of all of her cattle in 1979, and had sold nearly all of the 3C Ranch holdings to Niles Thim Corporation, in 1981, Ms. Rowe was allowed to retain the Forest Service grazing permit, and it was assigned to Allen H. Geyer, dba Campbell Estates, who was the sole bidder at the January 7, 1987 auction of the 3C Ranch. She also retained a first lien upon the remaining acreage, consisting of 240 scattered acres, following foreclosure. Mr. Geyer later filed for bankruptcy, and the American Flag Grazing Allotment and State Lease 200 were acquired by the Arizona Agricultural Credit Association,

on May 18, 1991, along with the 240 acres of land, for $700,000 (See Trustee's Deed, App. p. 37).

The Coronado National Forest personnel were closely associated with all of the prominent owners of the 3C Ranch and frequently accompanied them to meetings to promote their various subdivision schemes for Section 15, including a shoping center, exclusive homesites, an exotic game refuge, and a world-class golf course.

Our Silver Earth, Golden Earth, and Good Earth claims, in Section 16, were/ are coveted by the 3C Ranch owners, not only because they are very valuable mining claims, and are scenic and well located by two roads, but because Section 15 does not have a required second access road for subdivisions, and they are needed for

that purpose. The fact that we had brought electicity to the Silver Earth claim, and had put down two wells, made it even more valuable for mining and subdivision purposes.

The foregoing facts have been set forth because this case involves extraordinary circumstances, and it cannot be fairly considered without this essential background information.

This many-faceted case spans over 30 years. It involves an ongoing conspiracy, federal abuse of power, and numerous illegal actions and improprieties by agents and agencies of the federal government. There were seven hearings, a trial for damages, and seven appeals. Due to the need for brevity, only a few legal questions can be presented.

* * * * * * * *

The Forest Service and Bureau of Land Management (BLM) began their unlawful harassment of Rices and other small miners upon the American Flag grazing allotment in June, 1957, when they contested our Silver Earth, Golden Earth, and Good Earth claims "pursuant to Section 5 of the Surface Resources Act (July 23, 1955 c. 375, § 7, 69 Stat. 372)." This Act gave the federal government the right to manage nonmineral surface resources on **"hereafter located"** mining claims (See App. p. 33). Although we had "exclusive" use of the surface (See pps. 14, 16, & App. p.29), and there was no salable timber on any of our claims, they were examined for gold, silver, and lead by U.S. Forest Service mineral examiner, Robert E. Wilson, who stated as follows in his Mineral Report of February 12, 1958:

> A **valid discovery of mineral** has been made on the Golden Earth and Silver Earth claims... (Emphasis added)

A stipulation recognizing our rights to the two claims were executed by the Acting Regional Forester, on September 17, 1958, and is recorded in Docket 636, page 319, of the records of Pinal County, Arizona. This Stipulation, which declared that we retained all rights asserted under the Mining Act of May 10, 1882, was also incorporated in the decision of BLM Hearing Officer, Rudolph M. Steiner, on May 5, 1959, following a hearing at Florence, AZ.

As stated in 30 U.S.C.A. §22, p. 50:

> A **valid claim**, though unpatented is a grant in the nature of an estate in fee, and if such an estate is taken by the United States **just compensation must be made therefor.** (See p. 7)

See, also 30 U.S.C.S. §26, n 4, p. 65, which states:

> Discovery of a valuable mineral deposit within its limits **validates** mining claim located in public land in conformance with statute, and its locator acquires exclusive possessory interest in claim, in form of property which can be sold, transferred, mortgaged, or inherited without infringing paramount title of United States: such interest may be asserted against United States as well as third parties, and **may not be taken from claimant by United States without due compensation.** United States v. Kosanke Sand Corp. (1973) 80 ID 538 (Emphasis added).

In the case of Humbolt Placer Mining Co. v. Best (9th Cir., 1961) 293 F.29 553, 555, the Court held that:

> It is not disputed that a **valid** mining claim on public land, though unpatented, is an interest in real property which cannot be taken from the owner under the power of eminent domain **except upon payment of just compensation**. (Emphasis added).

As stated in St. Louis Mining Co. v. Montana Mining Co. 171 U.S. 655, 19 Sup. Ct. 61, 43 L.Ed. 320: "Where there is a

valid location of a mining claim, the area becomes segregated from the public domain and the property of the locator." See, also, Reed v. Munn, 148 Fed. Reporter 737 at 3 (1906).

Although the government's authority under the Surface Resources Act of 1955 was limited to management of vegetative surface resources on "hereafter located" claims, and the Good Earth mining claim was located on January 7, 1954, the Forest Service seized the surface rights on the 20-acre tract. They did this by invalidating it by **improper sampling**. All of our claims contain tungsten, which is in plentiful supply in this area, and other valuable minerals. By taking only one sample from each claim, and testing for only gold, silver, and lead, the Forest Service could declare the claim to be "invalid," when it was, in fact, valid.

As shown by the foregoing, once a claim has been declared "valid," it cannot be taken from the owner except for the "**public benefit,** in which case he must be paid **"just compensation."** A valid claim is segregated from the public domain and cannot be re-examined as long as it is held by an owner who is in compliance with federal mining laws.

The examination of our Silver Earth, Golden Earth, and Good Earth claims under the Surface Resources Act, which pertained to **"hereafter located"** mining claims (App. p. 33), violated Constitutional prohibitions against application of **ex post facto law**s. The seizure of the surface rights on the Good Earth claim was also in violation of our Fifth Amendment rights to due compensation.

Since unpatented 3C Ranch and Magma Copper Company claims in the same area

were excluded from examinations under the Surface Resources Act, our Fourteenth Amendment rights to equal treatment under the law were also violated.

The documented facts of this case show that Theodore J. and Elizabeth B. Vaitses purchased the 3C Ranch and mining interests of Mary West on June 12, 1959. Shortly thereafter, Mr. Vaitses approached the Coronado National Forest Supervisor regarding a land exchange, whereby he would acquire the highly mineralized lands surrounding his patented acreage (consisting of 5,280 acres) in return for nonmineral acreage he held elsewhere. Mr Vaitses designated the lands he wanted, including Rices' claims, and the Forest Service compiled a list of small mining claimants who would have to be removed and their claims seized in order to implement the proposed trade. As shown

by a U.S. Government Memorandum, dated July 20, 1961, addressed to the Coronado National Forest Supervisor, District Ranger John W. Waters, and U.S. Forest Service mineral examiner Harve I. Ashby, did state that our Silver Earth and Golden Earth claims had been found to be "valid lode mining claims," and that they might have to be excluded from "the proposed land exchange."

In 1961, the Forest Service began to "clear" the selected lands of small mining claimants by threats, harassment, intimidation and eviction notices. They later resorted to willful and malicious destruction of property, by arson and other means. Most of these people, like us, had located their claims prior to 1955, and were bona fide mining claimants who were in compliance with federal mining laws.

In early February, 1962, we saw no less than six Forest Service vehicles in our vicinity, and on February 9, our house was burned. We and our three young sons barely escaped with our lives. We had no insurance and suffered great hardship as a result of the fire.

On March 28, 1962, District Ranger, John W. Waters, came by our Silver Earth claim and advised us not to rebuild because the Forest Service had a land trade pending with the owners of the 3C Ranch, and that "...the Vaitses will get the land anyway." He never at any time charged us with trespass because, as evidenced by the U.S. Government Memorandum, dated July 20, 1961, he was well aware that we were on a "valid" claim. (p. 29)

On April 5, 1962, Mr. Waters wrote us a letter, which he sent by certified

mail. It stated as follows:

> "Dear Mr. Rice:
>
> "This letter is to confirm our conversation of March 28, 1962, at your claim. I did not learn until that date of your misfortune in losing your house to fire. As we discussed last week, **because of the proposed land exchange, your claim will be re-examined for validity in the near future.** I would advise that you delay construction of your new house until such determination is made. In the event that your claim is not found to be valid you would be required to remove all buildings and improvements within a given time, usually sixty to ninty days. (Emphasis added)
>
> "Yours truly,
>
> /s/ John W. Waters
>
> JOHN W. WATERS
> District Ranger
> Santa Catalina District"

The Waters' letter (supra), which was filed many times, and placed into evidence at the trial for damages, held November 9, 1987, showed, beyond any doubt, that the "re-examination" of the

Silver Earth and Golden Earth claims, and the examination of the other eight Pick & Shovel claims was for a secret and illegal land exchange, not in accordance with law.

As Rices have pointed out, repeatedly, the "proposed land exchange" was unlawful in that it did not meet any of the three basic requirements of the law (16 U.S.C. § 485, governing such exchanges of national-forest lands (See App. p. 27). These are: (1) It must be for the **public benefit**; (2) It must be advertised in a local newspaper for four consecutive weeks; and (3) The lands to be traded must be "nonmineral in character." There was also a conflict of interest in that the land trade proponent was engaged in extensive mining activites.

The fact that the Silver Earth and Golden Earth claims were "valid," and that they and our other eight Pick & Shovel

claims were examined for a secret and illegal land exchange proposal were vital issues that had to be considered in order to render a fair and impartial decision in our case. Failure of the judges to consider these material facts was fundamental error, which is defined in Ruis v. Faulkner, 470, P2d 500, 12 Ariz, App.352, as follows:

> ...fundamental error is error that goes to the foundation of a case or which takes from a party a right essential to his case ...

In refusing to consider essential material facts, and to set aside the case on the grounds that it had proceeded from an unlawful base, and plaintiff's actions were not in accordance with the law (See 5 U.S.C. § 706, App. p. 25), the courts denied us our fundamental Fifth and Fourteenth Amendment rights to fairness and just compensation. As a result, an

erroneous decision was reached, reconsideration of which will be in the interest of justice.

Two U.S. Forest Service mineral examiners, Jack Pardee and Gilbert Matthews, began their examinations of our Pick & Shovel Group on December 20, 1962. Their Mineral Report, dated May 27, 1967, recomended that "adverse proceedings be directed against all of the subject mining claims." Meanwhile, we had Mineral Survey No. 4624 (AZ) performed upon the Pick & Shovel Group (including the Silver Earth and Golden Earth claims). By Certificate dated June 22, 1966, G.D. Voorhees, Acting Chief, Division of Engineering of the Phoenix office of the Bureau of Land Management (BLM), certified that not less than $500 had been expended for labor or improvements on or for the benefit of each of the 10 claims. Under

federal mining law, 30 U.S.C. § 29 (See App. p. 30), $500 per claim is **all** that the federal goverment may legally require for labor and/or improvements on a mining claim in order to patent. As stated in Wilbur v. United States, ex rel, Krushnic, 280 U.S. 306, 74 L.Ed. 445 (1930):

> By § 2325, rev. Stat. U.S.C., title 30, § 29, provision is made for issuing patents for claims located under the mining laws. One of the prerequisites, **and the only one with respect to labor,** is that the claimant must show **"that $500 worth of labor has been expended or improvements made upon the claim by himself or grantors."** (See App. p. 30) (Emphasis added).

We had held and worked the Silver Earth, Golden Earth, Good Earth, New Year Nos. 1 and 2, and Goldie's Fraction lode mining claims for over 10 years by the time the Forest service and Bureau of Land Management served their Complaints,

on March 15, 1967 (See p. 14), and had a **right to patent** under 30 U.S.C. § 38 (See p. 8, Evidence of Possession and Work to Establish a Right to Patent).

We appealed from the negative decision of BLM Hearing Examiner, Rudolph M. Steiner, issued on September 9, 1968. We were still on appeal to the Secretary (A-31123) from an adverse ruling of the Interior Board of Land Appeals (IBLA) when the Coronado National Forest Supervisor, Clyde W. Doran, attempted to eject us in 1971 and 1972, in order to consummate another secret land exchange. This trade was with Thelma M. Rowe, who had purchased the 3C Ranch in 1965, and had organized the $6,000,000 VY-73C Ranch Corporation, for mining, ranching, and subdividing.

On August 24, 1972, widely publicized charges of criminal trespass were filed

(CIV-72-121-TUC), portraying us as "squatters," who had illegally entered the forest for residential purposes only, and vindictively demanding retroactive rents and interest from february 9, 1962, when our house was burned, **by arson**, to expedite the pending illegal land trade with 3C Ranch owner, Theodore J. Vaitses.

The Coronado National forest Supervisor was responsible for the proposed illegal land trade with Mr. Vaitses, and although he had been informed that we were on a **valid** claim by a U.S. Government Memorandum, supra, dated July 20, 1961 (See pps. 29 and 30), he had revealed, in a U.S. Government Memorandum, dated february 24, 1972, that he had considered using "self help" to remove us. He used any means necessary to clear all claims in the trade area except the 3C's and Magma's.

Since mining claims have never been

under the Mineral Leasing act, and we were/are on a valid mining claim that ceased to be public domain in 1958 (See pps. 25 and 26), and the Silver Earth claim was/is eligible for patenting under 30 U.S.C. § 38 (See pps. 23, 24-26), the actions of the Forest Service were unlawful, and the assessments for rents and interest amounted to attempted extortion, with malice.

On February 1, 1974, U.S. District Court Judge, Charles L. Powell, **set aside** the adverse decision of BLM Hearing Examiner, Rudolph M. Steiner, which had found our claims to be "null and void for lack of discovery." His ruling had been based upon the testimony of U.S. Forest Service mineral examiners, Jack Pardee and Gilbert Matthews, and their Mineral Report (See p. 34). Judge Powell wanted to dismiss the case, but our attorney insisted that

it be remanded. In so doing, he erred seriously, as **there was no legal basis for a continuance of our case at that point**. After our attorney insisted on having the case remanded, Judge Powell, who was a "visiting judge," ordered a **new** hearing and the taking of **new** evidence.

By 1974, all of our Pick & Shovel Group of claims were eligible for patenting under 30 U.S.C. § 38 (See pps. 8 and 14). We had held the Golden Earth, Silver Earth, and Good Earth claims for **over 20 years** by February 1, 1974, and even if they had not been valid, and had not been worked, they would have been segregated from the public domain by that fact (See 30 U.S.C.S. § 26, n 10, p. 68, on p. 8 hereof). As stated in 30 U.S.C.A., § 26, Ch. 2, p. 134:

> Locator in actual occupancy of a mining claim who has been evicted by a wrongdoer is not required to give evidence of every fact necessary to a valid location in an action to recover possession as **under a long possession** a presumption of a valid location arises. (Emphasis added).

In 1975, we leased our claims to Western Resources Corp., of Houston, with an OPTION TO PURCHASE AGREEMENT for $800,000, plus royalties. The Coronado National Forest personnel (USFS) harassed our lessee, and finally sabotaged our valuable Agreement by announcing, in a headline article, in the SAN MANUEL MINER (9/22/76), that they were planning to trade the sections where our claims were located (Secs. 9 and 16), and that "... mineral rights will probably be included."

A three-day de novo hearing began on March 22, 1978, with Administrative Law Judge Rudolph M. Steiner again presiding.

Since we had appealed from his prior adverse decision, he could not legally preside (See 28 U.S.C. § 47, on p. 6), and his doing so denied us a fair and impartial hearing. The Government's two main witnesses were, once again, Jack Pardee and Gilbert Matthews, who had prepared the Pardee/Matthews Mineral Report, in 1967, and had testified at the 1967 hearing before BLM Hearing Examiner, Rudolph M. Steiner.

At this hearing, Jack Pardee, who had been promoted to the Southwest Regional office (USDA), at Albuquerque, testified that he had attended a secret meeting, held in Tucson, in the early 1960's, prior to examining our Pick & Shovel Group of claims. The Coronado National Forest Supervisor and the land trade proponent were in attendance, and he had been instructed not to examine

any of the 3C Ranch's claims located in the same area as ours. He also testified that Mr. Vaitses had staked numerous claims in the highly mineralized area to prevent third party entry while the land trade was pending; that the 3C Ranch owners (i.e. the Vaitses and Thelma M. Rowe, aka VY-73C Ranch Corporation) were "the three land trade proponents," and that the examinations of our claims were for a "private exchange." His revelations were so startling that our attorney and a group that he was affiliated with later called for a Congressional investigation of our case, to which three Arizona Congressmen concurred, but Rep. Morris K. Udall, until recently Chairman of the House Committee on Interior and Insular Affairs, dissented.

The only other Government witness at this hearing was Raj Daniel, who admitted

that he had examined only five of our 10 Pick & Shovel Group of claims and, like Pardee and Matthews, did not examine for scheelite and/or tungsten, which is plentiful in this area. (Some of the adjoining patented YMCA claims, recently leased by Newmont Exploration Ltd., contain tungsten mines.)

Mr. Daniels further testified that he had just left his job with Newmont, supra, where he had worked for 14 years, when he began examining our claims, in 1976, and that he was accompanied during his examinations by Gilbert Matthews, a former Magma Copper Company employee. Nearby Magma is a subsidiary of Newmont Exploration Ltd., and the Newmont and/or Magma Copper Company mining properties join the 3C Ranch, whose owners were/are engaged in mining, real estate, and land development. As previously stated,

Newmont is currently staking and leasing claims within a short distance of ours.

Although he was bound by 5 U.S.C. § 706 (See App. p. 25) to "hold unlawful and set aside...agency action ... not in accordance with the law...," Judge Steiner ignored the numerous irregularities and illegalities involved in the contesting and examining of our claims, and arbitrarily limited the hearing to whether a valid mineral discovery exists within the limits of each claim, and whether the lands embraced by the claims are mineral in character "within the meaning of the mining laws." The "mining laws" that he and T. Adrain Pedron, Esq., Office of the General Counsel (USDA), Albuquerque, who was representing the Government, had reference to were the "prudent man" and "marketability" tests for validity. These two Departmental rules have been used by the Forest

Service and Department of Interior to quietly deprive thousands of small miners (including Rices) of mining claims and improvements aggregating billions of dollars, without regard to their Fifth Amendment rights to fairness and payment of just compensation for their property; their Fourteenth Amendment right to equal treatment under the law; or federal mining laws.

The "prudent man" and "marketability" rules for establishing the validity of mining claims are based upon a Department of the Interior statement, purportedly made in the 97-year-old case of Castle v. Womble, 19 I.D. 455, 457 (1894), which provided that:

> "... where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in further expenditure of his labor and means with a reasonable prospect of

> success in developing a valuable mine, the requirements of the statute have been met." (See Coleman v. United States, 363 F.2d 190 (1966).

Although it is stated, in Coleman v. United States, that "[7] **All** mining claims must meet this test to be valid," the validity of claims of large mining interests and prominent individuals are rarely challenged. In imposing the two Departmental rules, supra, the Forest Service and Department of the Interior "target" the small miner, who then has the "burden of proof" to show that he is a "prudent man" and that his claims are valid. He can do this by hiring attorneys, and producing witnesses and evidence to show that he has spent thousands of dollars to successfully develop a "producing mine." He must further prove that there is "present marketability" for his product(s), and the profit must be sufficient to meet the

arbitrary and ever fluctuating standards of the Administrative court and the Interior Board of Land Appeals (IBLA). If he fails to do so, which is generally the case, his claims and improvements are seized, and he is charged with trespass from the date of entry upon the claim(s). He may also be assessed retroactive rents and interests, together with restoration and other costs. The Forest Service is well aware that, when confronted with the foregoing possibilities, most small miners will abandon their claims.

The "prudent man" and "marketability" tests are clearly inconsistent with federal mining laws, which provide that the **discovery** of a valuable mineral deposit **validates** claim (See pps. 7 and 24-25), and requires that the mining

claimant expend **only $500 per claim** (including annual assessment work) for labor and/or improvements in order to patent his claim under 30 U.S.C. § 29 (See App. pps. 30-32).

When this hearing began, all of our claims except Calcium Carbonate, Diabase Ridge, Three Sons, and Lee's Fraction had been held for "over 20 years," and were also eligible for patenting under 30 U.S.C. § 38 (See pps. 8, 14, and 39). Even if the hearing had been legal otherwise, the Government no longer had jurisdiction under the law of eminent domain. Testimony of our two expert witnesses at the 1967 and 1978 hearings showed the Calcium Carbonate, Diabase Ridge, Three Sons, Golden Earth, Silver Earth and New Year No. 2 claims are valid lode mining claims. The fact that Western Resources

Corp. had leased the Pick & Shovel Group and had spent a considerable amount of labor and money to develop a "producing mine," showed that they had met the "prudent man" and "marketability" tests, but the Court ignored this fact. On June 28, 1979, he again declared the 10 claims to be "null and void."

In their adverse decision of May 23, 1983, the IBLA stated:

> "It is not the function of the Interior Board of Land Appeals to make an inquiry into the motivation of any Government agency which has initiated a contest against any mining claimant..."

Since they were also bound by 5 U.S.C. § 706 (See App. p. 25), they had a duty to "set aside... agency action, findings, and conclusions ... not in accordance with the law." Their failure to consider the "motivation" for contesting our claims and the circumstances under which they

were examined, as well as the legality of the two Departmental rules which had been used to seize our claims, denied us our Fifth and Fourteenth Amendment right to fairness, just compensation, and equal treatment under the law.

On December 13, 1984, we were served with a Complaint, prepared by Assistant U.S. Attorney, Michael A. Johns, of the U.S. Attorney's office, Phoenix, which stated, on page 3, that: "Since February 9, 1962, defendants have occupied the aforesaid claims and have sustained structures and improvements on the aforesaid Silver Earth claim." We had moved on the claim in August, 1954, and February 9, 1962 was the date of the disastrous fire that had nearly cost the Rice family their lives. He used the date four times in his Complaint, which was an updated version of the Complaint filed for

trespass on August 24, 1972 (CIV-72-121-TUC). In a letter, dated August 8, 1985, which was placed into evidence by us at the trial for damages, held in Phoenix, on November 9, 1987, Mr. Johns stated that he knew we were living upon the Silver Earth claim before February 9, 1962, but that he "just chose" that date for calculating damages. It appears that he used the incorrect date to conceal the fact that we were on a valid claim (See pps. 14, 23-26), and that six of our claims were eligible for patenting under 30 U.S.C. § 38 (See p. 8) by the time Complaints contesting the validity of our Pick & Shovel Group were served on March 15, 1967. He may have also used the date for purposes of intimidation.

Although we were bona fide miners, who had operated mines in New Mexico and Arizona, own other claims, and owned a

lot of mining equipment, vehicles, etc., that had to be guarded, Mr. Johns persisted in portraying us as "squatters," who had trespassed upon the forest, primarily for residential purposes. Such omissions and distortions of fact are a violation of 18 U.S.C.S. §1001 (See p. 5).

The brutal harassment begun by the U.S. Forest Service was continued by Mr. Johns, who took full advantage of the fact that we were appearing pro per, and whose lack of neutrality and fairness encouraged the ongoing conspiracy to unlawfully seize our claims and improvements, and to cover-up the facts of our case. This inappropriate behavior on the part of a public official, charged with law enforcement, denied us our Fifth and Fourteenth rights to fairness, due process, just compensation, and equal treatment under the law.

On January 8, 1985, Assistant U.S. Attorney, Michael A. Johns, filed a Motion for Summary Judgment in behalf of the plaintiff (i.e., U.S. Forest Service), and submitted a bill for rents and interest from the date of the fire (2/9/62), which had been prepared by J.M. Borens, Jr., Lands Forester, together with an "Estimation for Removal Cost of Rices' Residence," in the amount of $6.785, provided by William F. Lewis, Asst. Rec. & Lands Staff, USFS, who is now District Ranger. By notarized letter, dated January 13, 1986, the alleged contractor, John C. Buchanan, repudiated Mr. Lewis' estimate. We filed Motions requesting that the case be dismissed on the grounds it had proceeded from an illegal basis, and plaintiff had filed a fraudulent document, but Judge Strand permitted Mr. Johns to replace the bogus bill with an

estimate in the amount of $2,542.88.

As shown by copy of an Affidavit of Goldie Rice filed in our case, Michael A. Johns telephoned Rices and told them that he was planning to request oral argument under Rule 11. While we were waiting to learn when the date had been set, we received a copy of Judge Strand's Order, filed July 3, 1986 (See App. p. 17), and learned that our claims and improvements had been seized by partial summary judgment issued under Rule 56(c), Fed. R. Civ. P., without a trial or a hearing. Judge Strand had been fully apprised of the facts of our case in our Answer, Statement of Facts, Conclusions of Law, and a 72-page Rebuttal to Reply Memorandum, with over 70 exhibits documenting our argument.

In his Order, Judge Strand admitted that he was subject to 5 U.S.C. § 706 (See App. p. 17). See, also, Chamber of Commerce

of Fargo, N.D. v. U.S., D.C.N.D., 1967, 276 F. Supp. 301, which states:

> The Federal district court had a duty to hold unlawful and to set aside agency action, findings and conclusions found to be arbitrary, capricious. and an abuse of discretion, or otherwise not in accordance with the law, and supported by substantial evidence. (See 5 U.S.C. § 706, App. p. 25)

As set forth in Beckham v. U.S., 1967, 375 F.2d 782, 179 Ct.Cl. 539, 88 S.Ct. 583, 389 U.S. 10(1) 19 L.Ed.2d 613:

> In determining arbitrariness, capriciousness, or insubstantiality of administrative decision, it is not necessary that court review always be restricted to record before the administrative body.

In our case, the administrative record was deliberately distorted, in violation of 18 U.S.C.S.§1001 (See p. 5), and the agency actions were plainly inconsistent with federal statutes.. (See Royalton College, Inc. v. Clark, D.C.Vt. 1969, 295

F. Supp. 365. See, also, Action Movement Against Destruction v. Trainor, D.C.MD. 1975, 400 F. Supp. 533, which states as follows:

> While due deference must be given to regularity of agency action, that presumption may not be used as an excuse by reviewing court to fail to make a probing review of the action.

Judge Strand could not legally use Rule 56, Fed. R. Civ. P. to seize our claims and improvements. As set forth in 5 U.S.C. § 706, Ch. 7, p. 236:

> Where federal court's determination is under this section and where there is a substantial controversy as to the material facts, **the district court is precluded from entering summary judgment pursuant to Rule 56, Fed. R. Civ. P., Title 28.** See Nickel v. U.S. C.A.N.M. 1974, 501 F.2d 1389. See, also, 28 U.S.C. § 2072, p. 6.

In his Order of July 3, 1986 (App. p. 17), Judge Strand relied on the "prudent man" and "marketability" tests, stating

that: "...objective economic factors are of primary consideration in determining the validity of a mineral claim," which is not true. Conformity with governing statutes and Constitutional requirements of fairness and equal treatment under the law are of prime importance.

As was shown by our Mineral Report (See pps. 34-36), we had met the $500 per claim requirement for patenting the Pick & Shovel Group under 30 U.S.C. § 29 (See App. p. 31). As stated in The Oil Shale Corporation, et al., v. Stewart L. Udall (Secretary of the Interior), 261 F. Supp. 954 (1966), at 961: "Whenever $500 worth of labor in the aggregate had been performed, other requirements aside, the owner became entitled to a patent, even though in some years annual assessment work had been omitted. P. Wolenberg, et al., 29 L.D. 302, 304; Nielson v.

Champagne Mining & M. Co., 29 L.D. 491, 493, 280 U.S. at 317, 50 S.Ct. at 104-05.

As explained on pages 44-48 hereof, the "prudent man" and "marketability" tests conflict with 30 U.S.C. § 29. Since they are based primarily on size of operations, they unfairly discriminate against the small miner in favor of large mining interests (including the federal government, which announced plans for nationalizing mining, on August 11, 1955 (See Title 30, MINERAL LANDS AND MINING, § 541(1), Withdrawal of lands from entry; expiration of mining claims.). Enactment of the Federal Land Policy and Management Act, 90 STAT. 2757 (FLPMA), on October 21, 1976, made it possible for the Secretary to transfer mineral lands directly to mining entities by trade (Sec. 206, 43 USC § 1716, or sale (Sec. 209, 43 USC § 1719), and gave impetus to taking of claims.

The fact that the "prudent man" and "marketability" tests have been widely used to seize claims and improvements, many of which were no longer under the jurisdiction of the federal government due to lapse of time (See p. 8), validity, etc., does not alter the fact that they are not in accordance with the law and are unconstitutional. As set forth in Pierce v. U.S., 1865, 1 Ct.Cl. 270, affirmed 74 U.S. 666, 7 Wall 666, 19 L.Ed 169:

> Usage cannot extend the power of the head of a department and an illegal practice prevailing among officers of the government, no matter how long continued or extensive, can never ripen into a binding usage.

See, also, Udall v. Oil Shale Corporation, et al., 406 F.2d 750 (1969), at 763, where it is stated that:

> ...These powers are not in the Secretary, but are vested in Congress and he has what the

statute provides that he have and no more. (Emphasis added).

In his Order of July 3, 1986 (App. p. 17), Judge Strand stated that we had "... only produced approximately $1000.00 worth of gold and scheelite from the contested claims," but failed to note for the record that we had been beset by almost continuous harassment and costly litigation (with resultant title uncertainties), since 1957. He also ignored the fact that Western Resources Corp. had leased our claims, but the Forest Service sabotaged the contract. Annual assessment work was (and is) also current.

Federal statute requires that a mining claimant spend only $500 per claim to patent, and the extent of operations on a mining claim are of little importance where title uncertainties make it impossible for him to preceed with development until such conflicts are resolved. 1 Rocky Mountain

Mineral Law Foundation, American Law of Mining, § 4.99, pps. 910.30-31 (1977).

As stated in Brubaker v. Board of County Com'rs, El Paso County, Colo., 1982, 652 P.2d 1050:

> Federal mining law has its foundation in the Mining Law of 1872, and **underlying purpose** of the Mining Law is to encourage exploration for mineral resources on public lands. See, also, 30 U.S.C. § 21(a). (Emphasis added)

As set forth in Waskey v. Hammer, 1912, 325 S.Ct. 187, 223 U.S. 85, 56 L.Ed. 359:

> The **object** of the law in requiring a discovery to precede the location of a mining claim is to insure good faith on the part of the locator and to prevent frauds upon the government. (Emphasis added)

As stated on pages 24 and 25, "...discovery of a valuable mineral deposit validates mining claim." We have discoveries on all of our mining claims.

As was held in U.S. v. Reed, C.C.,

Or., 1886, 28 F.482:

> The nature and extent of the deposit of minerals which will make a tract of land "mineral" or constitute a mine thereon within this section (30 U.S.C. § 21, Ch. 2, p. 21) has not been determined.

The Court cannot exceed the requirements of the statutes, and where it has, the mining claimant has been illegally deprived of his claims.

There was fundamental error in Judge Strand's decisions (See pps. 32-34). He also erred in denying our counterclaims. There was/is an ongoing criminal conspiracy (See Am Jur 2d, CONSPIRACY, § 2) to take our claims for unregulated "private" land exchanges and/or sales, which are big business in the State of Arizona. Where a conspiracy is involved, statutes of limitation do not apply, It is renewed each day of its existence. Riss & Co. v. Association

of American Railroads, D.C. 80 S.Ct. 108, 361 U.S. 804, 4 L.Ed 2d 57, certiorari denied, 267 F.2d 659, 105 U.S. App. D.C. 382.

As shown on pps. 48-50 of our Informal Brief, filed in the Ninth Circuit Court of Appeals, on January 11, 1991, we have filed counterclaims in the amount of $17,747,447.34. Where there has been misconduct on the part of U.S. Government employees, sovereign immunity is not applicable. Under 28 U.S.C. §§ 2674 and 2675, government is liable "... in the same manner and to the same extent as a private individual under like circumstances..."

Our valuable claims and improvements were seized by "rules," in violation of 28 U.S.C. § 2072 (See p. 6). They had also ceased to be public domain (See pps. 14, 26, 39, and 48). As is stated in The

Shale Oil Corporation, et al., v. Stewart W. Udall, 261 F.Supp. 954 (1966), at 954: "Adjudication by tribunal lacking jurisdiction is wholly nugatory, need not be appealed, and cannot be res judicata."

As shown on the Docket Sheet, following the trial for damages, held at Phoenix, on November 9, 1987, Michael A. Johns removed eight of our "marked and admitted" exhibits documenting wrongdoing on the part of the plaintiff.

On August 6, 1991, Mr. Johns sent us a letter in which he stated that he was planning to get a Writ of Restitution to evict us, and ordered us to remove our personal property. Everything else would be "buried on the site." He also requested that we mail him a check for interest, in the amount of $1,698.38, so that he could "get the bond released." We had a Motion for Reconsideration pending before Mr.

Justice David Souter, pursuant to Rule 22.5 at the time. This unwarranted and illegal harassment has made it very difficult for us to proceed with the preparation of this Petition.

REASONS FOR GRANTING THE WRIT

The whole record of this case shows (and thoroughly documents) the fact that Rices were the victims of wrongdoing on part of the plaintiff. The Court should issue a Writ of Certiorari to correct the injustices found herein.

Respectfully submitted,

Lee H. Rice, Petitioner

Goldie E. Rice, Petitioner

P.O. Box 245
Oracle, Arizona 85623
Telephone: 602-896/2565
Appearing pro per

September 16, 1991

Supreme Court, U.S.
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91-493

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

LEE H . RICE and GOLDIE E. RICE, PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

LEE H. RICE
GOLDIE E. RICE

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F I L E D
APR 15 1991

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	) No. 90-16329
Plaintiff-Appellee,	) D.C. No. CV-2330-PHX-RG
v.	)
LEE H. RICE, and GOLDIE E. RICE,	) MEMORANDUM**
Defendants-Appellants.	)

Appeal from the United States District Court for the District of Arizona
Roger G. Strand, District Judge, Presiding

Submitted March 18, 1991**

BEFORE: NORRIS, BEEZER, and BRUNETTI, Circuit Judges

In 1988, the District Court of Arizona entered a judgment upholding a

decision of the Interior Board of Land Appeals, declaring defendants' ten unpatented mining claims to be invalid, directing the defendants to vacate the claims, and awarding damages to the United States. On appeal, this court affirmed the district court's finding as to the invalidity of the claims, but reversed and remanded the issue of damages. On remand, the district court recalculated damages and again entered judgment in favor of the United States. Defendants filed a timely appeal.

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Circuit Rule 36-3.

**This panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); Circuit Rule 34-4.

F I L E D

JUL 09 1990

Richard H. Weare, Clerk
United States District Court
for the District of Arizona

By /s/
Deputy clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

THE UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CIV-84-2330-PHX-RGS
	)	
v.	)	
	)	O R D E R
LEE H. RICE and GOLDIE E. RICE,	)	
	)	
Defendants.	)	
	)	

Plaintiff's Motion for Entry of Amended Judgment After Remand having been presented, and the court having considered the Memorandum Decision of the United States Court of Appeals for the Ninth Circuit, and neither party having suggested that a trial is necessary in order to recalculate damages in

accordance with the decision of the appellate court, the court further having re-examined the pertinent exhibits submitted at trial upon the issue of damages which were introduced into this action November 9, 1987, and the court finding that no further evidence or argument is necessary in order to comply with the order of remand received from the appellate court,

IT IS ORDERED vacating the trial heretofore set for July 6, 1990, at 9:30 a.m..

IT IS FURTHER ORDERED that in accordance with the Plaintiff's Exhibit C, the Court finds and concludes the value of Rice's use and occupancy for residency on one of the unpatented mining claims from January 1, 1978 through 1986, including

interest compounded at the rate of seven percent per annum is the sum of $4,878.92 instead of the sum of $9,279.41 as was heretofore found by the court upon the original damage trial by the court. The court finds and concludes that defendants are liable to plaintiff in the amount of $7,091.15 which represents defendants' liability to plaintiff in the amount of $4,878.92 for the reasonable value of defendants' past occupancy and use of public lands as a residence, including prejudgment interest for the years 1978 through 1986, and defendants' liability to plaintiff in the amount of $2,212.23 for the reasonable cost of removal and restoration.

IT IS ORDERED that judgment be entered in favor of plaintiff United States of America and against defendants

Lee H. and Goldie E. Rice in the principle sum of $7,091.15 together with interest thereon at the legal rate from and after the original judgment herein, to wit, April 14, 1988, until paid, and plaintiff's taxable costs.

FURTHER ORDERED that the defendants shall vacate the subject land and shall remove all of their property located thereon within sixty (60) days after the filing of this order.

DATED this 3rd day of July, 1990.

/s/ Roger G. Strand
HONORABLE ROGER G. STRAND
U.S. DISTRICT COURT JUDGE

F I L E D

JUL 9 1990

Richard H. Weare, Clerk
United States District Court
For the District of Arizona
By /s/

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

LEE H. RICE and GOLDIE E. RICE,

Defendants.

JUDGMENT IN A CIVIL CASE

Case Number: CIV-84-2330 PHX-RGS

[ ] **Jury Verdict,** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] **Decision by Court.** This action came to trial on hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Plaintiff, United States of America, and against

Lee H. and Goldie E. Rice, in the principle sum of $7,091.15, together with interest thereon at the legal rate from and after the original judgment herein, to wit, April 14, 1988, until paid, and Plaintiff's taxable costs.

IT IS FURTHER ORDERED AND ADJUDGED that Defendants shall vacate the subject land and shall remove all of their property located thereon within sixty (60) days after the filing of this judgment.

July 9, 1990
Date

RICHARD H. WEARE, CLERK
Clerk

/s/ S. Dorfman
(By) Deputy Clerk

F I L E D
OCT 18 1990

CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 90-16329
Plaintiff-Appellant,	DC# CV-84-2330-PHX-RG
vs.	Arizona (Phoenix)
LEE H. RICE,	
Defendant-Appellant,	ORDER
and	
GOLDIE E. RICE,	
Defendant-Appellant.	

Before: HUG and SCHROEDER, Circuit Judges

Appellants have not demonstrated that they are financially unable to post a supersedeas bond. See Miami International Realty Co. v. Paynter, 807 F.2d 871, 873-74 (10th Cir. 1986). Their emergency motion for a stay pending

appeal without posting a supersedas bond is therefore denied.

The district court's order of September 17, 1990 is modified as follows: appellants shall vacate the subject land and remove all their property located thereon unless they file a supersedas bond in the amount of $7091.15 on or before November 1, 1990.

Upon posting of such bond, the government shall take all necessary steps to ensure that any lien it has placed upon appellants' property for the amount of any judgment in this action shall be lifted.

MoCal 10/18/90
1

NON-TRANSFERABLE
TIME CERTIFICATE OF DEPOSIT

Bank	office No.	Type	No. 3038436
01	107	010	

Customer No.	Effective Date
107722611	10 29 90

LEE H RICE OR GOLDIE E. RICE** ** ** **
HA ve DEPOSITED IN THIS BANK NOT SUBJECT TO CHECK
First
Interstate 7,091 dol's 15 cts DOLLARS
7,091.15** ** ** ** ** ** ** ** ** **PAYABLE
TO LEE H RICE OR GOLDIE E RICE
** ** ** ** ** ** ** ** ** ** ** ** ** ** **
IN CURRENT FUNDS ON MATURITY AS HEREAFTER SPECIFIED AND UPON PRESENTATION AND SURRENDER OF THIS CERTIFICATE PROPERLY ENDORSED SAID DEPOSITS EARN INTEREST AT THE RATE OF 6.60 PERCENT PER ANNUM FOR 1 YEAR TERM FROM THE DATE HEREOF UNTIL ULTIMATE MATURITY, SUCH INTEREST TO BE PAYABLE COMPOUND MONTHLY TO MATURITY**

First Interstate Bank of Arizona, H.A.

Customer Copy Authorized Signature

/s/ Ruebin A. Mumereford

"'3038436"' ':599918001':

DATE 10/29 1990 No. 0208

RECEIVED FROM LEE H RICE and GOLDIE E RICE

ADDRESS P.O. Box 245

Oracle, AZ 85623 DOLLARS $7,091.15

FOR Supersedeas Bond

CIV 84-2330-PHX-RGS

9th CCA Ord. 10/18/90

By /s/ G.S. Lenny

ACCOUNT	HOW PAID
Amt. of Account	Cash
Amt. Paid	Check
Balance Due	Money Order

JUDGMENT ON DECISION BY THE COURT

F I L E D

APR 14 1988

Richard H. Weare, Clerk
United States District Court
for the District of Arizona

By_____
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff,	) CIV-84-2330-PHX-RGS
vs.	) **JUDGMENT**
LEE H. RICE and GOLDIE E. RICE, Defendants.	)

This action came on for trial before the Court, the Honorable Roger G. Strand, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that judgment be granted in favor of plaintiff United States of America and against defendants Lee H. and Goldie E. Rice in the principle sum of $11,491.64 together with interest thereon at the legal rate of 7.01% from the date of judgment until paid, and plaintiff's taxable costs.

IT IS FURTHER ORDERED AND ADJUDGED that defendants shall vacate the subject land and shall remove all of their property located thereon within 30 days after the filing of this order.

DATED at Phoenix, Arizona, this 14th day of April, 1988.

RICHARD M. WEARE, CLERK

By: /s/ Marci Groves
Deputy Clerk

F I L E D

JUL 03 1986

Richard H. Weare, Clerk
United States District Court
for the District of Arizona

By /s/
Deputy Clerk

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, vs. LEE H . RICE, et al., Defendants.	CIV 84-2330 PHX RGS O R D E R

The plaintiff, United States of America, has filed a Motion for Summary Judgment pursuant to Rule 56, Fed.R.Civ. Pro. In its complaint, the government seeks an ejectment of the defendants from the contested land, and monetary sums related to the restoration of the property and reasonable rental value

through February 9, 1985. The defendants, Rice, et al. (Rice), have responded denying the validity of plaintiff's claims for relief and have asserted counterclaims seeking damages.

This mineral contest has been adjudicated on two occasions by the Department of the Interior. Judicial review of such a mineral contest is suthorized under the Administrative Executive Procedure Act, 5 U.S.C. § 701 et seq. and is confined to the administrative record. If there is substantial evidence to support the findings of the agency, they must be affirmed. Benrickson v. Udall, 350 F.2d 949 (9th Cir. 1965). Further, such a determination presents an issue of law and is appropriately disposed of by a motion

for summary judgment. McCall v. Andrus, 628 F.2d 1185 (9th Cir. 1980), cert. denied, 450 U.S. 996 (1981); Dredge Corporation v. Penny, 338 F.2d 456 (9th Cir. 1964); Benrickson, supra.

Under both the "prudent man" and "marketability" tests, objective economic factors are the primary consideration in determining the validity of a mineral claim, not the subjective evaluations of a particularly individual. United States v. Coleman, 390 U.S. 599 (1968). The record shows that Rice, et al., failed to establish the validity of their mining claims, because they did not substantiate the discovery of a valuable mining deposit. Rice only produced approximately $1000.00 worth of gold and scheelite from the

contested claims during the nearly 30 years residency on the land. As a result, Rices' claims were declared invalid by a decision of Administrative Law Judge R.M. Steiner issued June 28, 1979. This decision was affirmed on appeal in a decision of the Interior Board of Land Appeals issued May 23, 1983 by Administrative Judge R.W. Mullen. This court's review of both the Administrative record and agency decision reveals that they were supported by substantial evidence and are in accordance with the law. The court therefore finds that the decision of the Interior Board of Land Appeals of the United States Department of the Interior issued May 23, 1983 is not arbitrary or capricious and is supportable by

by substantial evidence, and accordingly is affirmed in all respects.

The defendants' counterclaim is barred by the doctrine of sovereign immunity and the two-year statute of limitations. The doctrine of sovereign immunity precludes most counterclaims in the present type of action. See, United States v. Foresyth, 321 F.Supp. 761 (D. Colo. 1971); United States v. Noqueira, 403 F.2d 816 (9th cir. 1968). The claimant must demonstrate that the government has waived sovereign immunity to allow their claim or counterclaim, and that they have exhausted the administrative remedies available under 28 U.S.C. § 2675(a) before bringing such a counterclaim. No such showing has been made in the present case. The facts establish that the defendants' counterclaim is

barred by both the doctrine of sovereign immunity and the two year statute of limitations.

Accordingly,

IT IS ORDERED granting partial summary judgment in favor of plaintiff and against defendants for injunctive relief ejecting the defendants from the property within 60 days of the date of this judgment, and for the removal of any property of the defendants within this 60 day time period or said property should be deemed abandoned, with legal title being acquired by the government.

FURTHER ORDERED granting summary judgment in favor of the plaintiff and against defendants dismissing defendants' counterclaims against the United States of America.

Further, the court finds the

existence of material questions of fact with respect to plaintiff's claims for damages for the cost of restoration of the subject property and for the reasonable value thereof. Accordingly,

IT IS ORDERED denying plaintiff's motion for summary judgment on these claims, the same to be established upon trial of these issues which is hereby set for November 4, 1986, at 9:30 a.m..

DONE IN OPEN COURT this 1st day of July, 1986.

/s/ Roger G. Strand
HONORABLE ROGER G. STRAND
U.S. DISTRICT COURT JUDGE

F I L E D
MAY 22 1991

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA Plaintiff-Appellee, v. LEE H. RICE and GOLDIE E. RICE, Defendants-Appellants.	No. 90-16329 D.C. No. CV-84-2330-PHX-RGS ORDER

BEFORE: NORRIS, BEEZER, and BRUNETTI, Circuit Judges

Appellants' petition for rehearing is denied.

5 U.S.C.S. § 706. **Scope of review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) **hold unlawful and set aside agency action, findings, and conclusions found to be--**

(A) **arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;**

(B) **contrary to constitutional right, power, privilege, or immunity;**

(C) **in excess of statutory jurisdiction, authority, or**

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute or;

(F) unwarranted by the facts to the extent that the facts are

subject to a trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts cited by a party, and due account shall be taken of the rule of prejudicial error. (Emphasis added)

16 U.S.C. § 485. **Exchange of lands in national forest**

When the public interests will be benefitted thereby, the Secretary of Agriculture is authorized in his discretion to accept on behalf of the United States title to any lands within the exterior boundaries of the national forests which, in his opinion are chiefly valuable for national-forest purposes, and in exchange therefor may patent not to exceed an equal value of such national-forest land, in the same state, surveyed and **nonmineral in character,** or he may authorize the grantor to cut and remove an equal value of timber within the national forests of the same State; the values in each case to be determined by him. **Before any such exchange is effected, notice of the contemplated exchange reciting the lands involved shall be published once a week for four successive weeks in some newspaper of general circulation in the county or counties in which may be situated the lands to be accepted, and in some like newspaper published in any county in which may be situated any lands or timber to be given in exchange.** Timber given in such exchanges shall be cut and removed under the laws and regulations relating to the national forests, and under the direction and supervision and in accordance with the requirements of the Secretary of Agriculture. Lands conveyed to the United States under this section and section 486 of this title become parts of the national forest within whose boundaries they are located.

28 U.S.C. § 455. **Disqualification of justice, judge or magistrate**

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned...

30 U.S.C. § 26. **Locators' rights of possession and enjoyment.**

The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs, and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins and ledges. Nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the verticle lines of his claims to enter upon the surface of a claim owned or possessed by another. (Emphasis added)

30 U.S.C. § 29. **Patents; procurement procedure; filing; application under oath**

A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title and section 661 of Title 43, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title, and section 661 of Title 43, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the Bureau of Land Management, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice

that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the Director of the Bureau of Land Management that $500 worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during during such period of publication. If no adverse claim shall have been filed with the register of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of $5 per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title and section 661 of Title 43.

Where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent made be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits. (Emphasis added)

(R.S. § 2325; Jan.22, 1880, c. 9 § 1, 21 Stat. 61; Mar. 3, 1925, c. 462. 43 Stat. 1144, 1145; 1946 Reorg.Plan No. 3, § 403, eff. July 16, 1946, 11 F.R. 7876, 60 Stat. 1100.)

30 U.S.C. § 612. **Reservations in the United states to use of the surface and surface resources**

(b) Rights under any mining claim **hereafter** located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land; **Provided, however,** That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto; **Provided further,** That if at any time the locator requires more timber for his mining operation than is available to him from the claim after disposition of timber therefrom by the United States, subsequent to the location of the claim, he shall be entitled, free of charge, to be supplied with timber for such requirements from the nearest timber administered by the disposing agency which is ready for harvesting under the rules and regulations of that agency and which is substantially equivalent in kind and quantity to the timber estimated by the disposing agency to have been disposed

of from the claim: **Provided further,** that nothing in sections 601, 602, and 611 to 615 of this title shall be construed as affecting or intended to affect or in any way interfer with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim.

July 23, 1955, c. 375, § 4.69 Stat. 368.

FILED

NOV 15 1989

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	) No. 88-2550
	)
Plaintiff-Appellee,	) D.C. No. CV-84
	) -2330-PHX-RGS
v.	)
	) ORDER
LEE H. RICE and GOLDIE E. RICE,	)
	)
Defendants-Appellants.	)
	)

BEFORE: NORRIS, BEEZER, AND BRUNETTI, Circuit Judges

Appellants' petition for rehearing is denied.

F I L E D

JUL 16 1991

CLERK, U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 90-16329
	)	
Plaintiff-Appellee,	)	D.C. No. CV-84-2330-PHX-RG
	)	
v.	)	
	)	
LEE H. RICE and GOLDIE E. RICE	)	ORDER
	)	
Defendants-Appellants.	)	
	)	

BEFORE: BRUNETTI, Circuit Judge

Appellants' emergency motion for reconsideration of this court's June 14, 1991, order denying appellants' emergency motion for stay of mandate and for injunction and restraining order pending filing of petition for writ of certiorari and final decision of courts is DENIED.

1677-065

SEAL

OFFICIAL RECORDS OF
PINAL COUNTY RECORDER
KATHLEEN C. FELIX

DATE: 18MAY90 TIME: 1450
FEE: $8.00 $4.00 $.00
PAGES: 004
DOCKET: 1677 PAGE: 065
INSTRUMENT # 978163

Recorded at the request
of, and when recorded
please mail to:

Jeffrey A. Goldberg
KALISH, FORRESTER & TORRES P.C.
9002 N. Central, Suite 100
Phoenix, Arizona 85020

TRUSTEE'S DEED

Jeffrey A. Goldberg ("Trustee"), as the duly appointed Trustee of the Deed of Trust hereinafter described, does hereby grant and convey, but without covenant or warranty, express or implied, to Arizona Agricultural Credit Assn. ("Grantee"), the real property, situated in Pinal County, Arizona, and more particularly described as follows:

See Exhibit "A" attached hereto.

Trustee states that:

This conveyance is made pursuant to the powers, including the power of sale, conferred upon Trustee by the Deed of Trust dated March 3, 1987, made by Campbell Estates, Inc., an Arizona Corporation, as Trustor, and Arizona Farmers

Production Credit Association existing and operating under the provisions of the Farm Credit Act of 1971, and amendments thereto, now known as Arizona Agricultural Credit Association, a cooperative credit association, as Trustee and Beneficiary, and recorded on March 18, 1987, in the records of Pinal County, Arizona, in Docket 1429, Page 216-218. Jeffrey A. Goldberg was substituted as Trustee pursuant to a Notice of Substitution of Trustee recorded on January 17, 1990, in the records of Pinal County, Arizona, in Docket 1651, page 812.

Property was sold by the Trustee at public auction on May 18, 1990, at the place named in the Notice of Trustee's Sale, Grantees being the highest bidder at such sale became the purchaser of the Property and made payment therefor to the Trustee in the amount of the bid, $700,000.00, which payment was made entirely in cash, or by the satisfaction, pro tento, of the obligation then secured by the Deed of Trust, including the fees, costs and expenses relative to the sale.

/s/ Jeffrey A. Goldberg
Jeffrey A. Goldberg, Trustee

1677-066

STATE OF ARZONA)
)ss.
County of Pinal)

This instrument was acknowledged before me this 18th day of May, 1990, by Jeffrey A. Goldberg, Trustee.

1677-066

/s/ Dolores R. Potter
Notary Public

My Commission Expires:

April 18, 1993

SEAL

1677-067

"EXHIBIT A"

1. The Southeast Quarter of the Northeast Quarter (SE¼NE¼), Section Twenty-one (21), Township (10) South, Range (16) East of the Gila and Salt River Base and Meridian, Pinal County, ARizona. (PARCEL 1)

2. The Northeast Quarter of the Southeast Quarter (NE¼SE¼), Section Twenty-one (21), Township (10) South, Range (16) East of the Gila and Salt River Base and Meridian, Pinal County, Arizona. (PARCEL 2)

3. The Northwest Quarter of the Northwest Quarter (NW¼NW¼), Section Fifteen (15), Township (10) South, Range (17) West of the Gila and Salt River Base and Meridian, Pinal County, Arizona. (PARCEL 3)

4. The Southeast Quarter of the Southeast Quarter (SE¼SE¼), Section Eighteen

(18), Township (10) South, Range (17) East of the Gila and Salt River Base and Meridian, Pinal County, Arizona. (PARCEL 4)

5. The South One-Half of the Northeast Quarter (S½NE¼), Section Twenty-nine (29), Township (10) South, Range (17), East of the Gila and Salt River Base and Meridian, Pinal County, Arizona. (PARCEL 5).

TOGETHER WITH Lessee's interest in Grazing Lease No. 200 between State of Arizona and VY-73-C Ranch Corporation, an Arizona Corporation, Lessee, for a period ending March 29, 1982, dated March 30, 1972, assignment of Lease by VY-73-C Ranch corporation to Thelma M. Rowe, a single woman dated March 30, 1977; Assignment by Thelma M. Rowe, a single woman to Taylor & Taylor, a Partnership July 27, 1979.

FOREST SERVICE GRAZING PERMIT KNOWN AS AMERICAN FLAG GRAZING ALLOTMENT
Permit No. 05-5932

Supreme Court, U.S.
FILED
OCT 15 1991
OFFICE OF THE CLERK

No. 91-493

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

LEE H . RICE and GOLDIE E. RICE, PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX

LEE H. RICE
GOLDIE E. RICE

P.O. Box 245
Oracle, Arizona 85623
Tel. (602) 896-2565

TABLE OF CONTENTS

Page

Copy of MEMORANDUM OF
Circuit Judges Norris,
Beezer, and Brunetti,
filed April 15, 1991 3

NOTE: Pages missing from above MEMORANDUM in APPENDIX previously submitted are labeled App. 5-A herein.

F I L E D
APR 15 1991

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	) No. 90-16329
Plaintiff-Appellee,	) D.C. No. CV-2330-PHX-RG
v.	)
LEE H. RICE, and GOLDIE E. RICE,	) **MEMORANDUM****
Defendants-Appellants.	)

Appeal from the United States District Court for the District of Arizona
Roger G. Strand, District Judge, Presiding

Submitted March 18, 1991**

BEFORE: NORRIS, BEEZER, and BRUNETTI, Circuit Judges

In 1988, the District Court of Arizona entered a judgment upholding a

decision of the Interior Board of Land Appeals, declaring defendants' ten unpatented mining claims to be invalid, directing the defendants to vacate the claims, and awarding damages to the United States. On appeal, this court affirmed the district court's finding as to the invalidity of the claims, but reversed and remanded the issue of damages. On remand, the district court recalculated damages and again entered judgment in favor of the United States. Defendants filed a timely appeal.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); Circuit Rule 34-4.

In our earlier decision, we held that "the United States is entitled to recover the reasonable value of past rent for the use of land in the case of trespass," and "is also entitled to recover prejudgment interest . . . and the reasonable costs of removing structures and restoring the land to its natural state." United States v. Rice, No. 88-2550, Memorandum Disposition at 16 (9/15/89) (citations omitted). We further held that applicable statute of limitations limited "the government's damages to six years prior to the commencement of the second action, that is, to December 13, 1978." Id. at 17.

On remand, the district court awarded damages in the total amount of $7,091.15. Of this amount, $2,212.23 represented the defendants' liability

to the United States for the reasonable costs of removal and restoration, and $4,878.92 represented the reasonable value of the defendants' use and occupancy of the land "from January 1, 1978 through 1986."

It was error for the district court to award damages for the period from January 1, 1978 through December 13, 1978. The District court assessed damages in the amount of $307.94 for this period.

However, because the district court did not award damages in favor of the United States for the defendants' use of the land for the years 1987 through 1990, any error in the district court's calculation of defendants' liability was harmless.

AFFIRMED.